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In the Supreme Court of the United States

OCTOBER TERM, 1959

MRS. SYBIL MAE FLOERSCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Pet. App. A) is reported at 171 F. Supp. 260. The opinion of the Court of Appeals (Pet. App. B) is reported at 276 F. 2d 714.

JURISDICTION

The judgment of the Court of Appeals was entered March 21, 1960. (Pet. App. D.) The petition for a writ of certiorari was filed May 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the extended statute of limitations applicable to a transferee's liability for income taxes applies in the case of a surviving wife who has suc-

ceeded to her husband's estate when a shorter period of limitation had run on her direct liability arising from the use of a joint return.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) [as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] *Husband and Wife.*—

(1) *In general.*—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * * *

(26 U.S.C. 1952 ed. 51.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

* * * * *

(c) *Omission from Gross Income.*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

* * * * *

(26 U.S.C. 1952 ed. 275.)

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

(b) *Period of Limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer—within one year after the expiration of the period of limitation for assessment against the taxpayer;

* * * * *

(d) *Suspension of Running of Statute of Limitations.*—The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 272(a), be suspended for

the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for sixty days thereafter.

* * * * *

(f) *Definition of "Transferee".*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(26 U.S.C. 1952 ed. 311.)

STATEMENT

The facts are not in dispute. On March 15, 1951, Mrs. Sybil Mae Floersch and her then husband, William E. Benton, filed a joint federal income tax return for the taxable year 1950, reporting a gross income of $21,338.21 and a tax owing thereon which was timely paid. The return understated gross income by the amount of $91,628.18, which was in excess of 25% of the gross income stated in the return. (R. 3, 6, 7, 15, 33.)

William E. Benton died on May 12, 1953. Pursuant to the provisions of his will, assets of his estate having a market value in excess of $71,000 were transferred to Mrs. Floersch. Because of the decedent's indebtedness to the United States, the transfers rendered his estate insolvent. (R. 7–8.)

On March 14, 1957, the District Director mailed a statutory notice of deficiency (R. 19–26) to Mrs. Floersch, notifying her, pursuant to the provisions of

Section 311 of the Internal Revenue Code of 1939, that (R. 19)—

> the determination of the income tax liability of Mr. William E. Benton for the year ended December 31, 1950 discloses a deficiency of $51,622.28 in income tax as shown in the statement attached. The amount of the deficiency stated, plus interest as provided by law, constituting your liability as Transferee of the assets of said William E. Benton will be assessed against you.

The notice further advised Mrs. Floersch of her right to petition the Tax Court for a review of the deficiency determination. However, no such petition was filed. On June 14, 1957, the principal amount of $51,622.28, which was paid on June 11, 1957, was assessed against petitioner as transferee of her former husband. One June 28, 1957, interest on the principal amount, in the sum of $19,329.36, was assessed against petitioner. She paid that amount on July 3, 1957. (R. 9–11, 27, 28, 30, 32, 33.)

After rejection by the Commissioner of a timely claim for refund, the petitioner brought suit in the United States District Court for the District of New Mexico (R. 3–4, 6, 15). An order of the District Court in her favor (R. 35–36) was reversed by the Court of Appeals (Pet. App. B).

ARGUMENT

The narrow question in this case is whether the extended statute of limitations on assessment against a transferee (Section 311(b)(1) of the Internal Revenue Code of 1939, *supra*, p. 3) applies to the pe-

titioner as a transferee, even though assessment against her on the basis of a joint return was barred by the shorter period provided by Section 275(c) of the 1939 Code, *supra*, p. 2. In the joint return for 1950, which was filed on March 15, 1951, the petitioner and her then husband failed to report more than 25% of the gross income disclosed by the return. Accordingly, since petitioner was a joint obligor (Section 51(b)(1) of the 1939 Code, *supra*, p. 2), the Commissioner, under Section 275(c), could have assessed a deficiency against her within five years after the return had been filed. That was not done. Instead, the Commissioner asserted the deficiency here involved against petitioner within the additional year allowed by Section 311(b)(1) in the case of transferee liability.

The petitioner argues that she may not be regarded as a transferee because, under the joint return, she and her husband "were each 'the taxpayer' " (Pet. 7). However, as the court below correctly noted, the petitioner's "liability to respond as a transferee stems from the fact that she holds property as a transferee in which [her husband's] creditors have an interest because the transfer results in his insolvency." (Pet. App. B, p. 4.) Thus the statutory bases for liability are entirely distinct and there is no reason why Congress should not adopt such period of limitation for each as it believes is appropriate for the type of liability. As to claims against a transferee, it is not unreasonable that the Internal Revenue Serv-

ice should have an additional year to trace down the assets and assess the tax.[1]

Neither *Commissioner* v. *Oswego Falls Corp.*, 71 F. 2d 673 (C.A. 2) nor *W. A. Sheaffer Pen Company* v. *Commissioner*, 27 B.T.A. 1056, which the petitioner argues support her position (Pet. 6–8), is pertinent here. In both it was held that the taxpayer was not liable as a transferee, so that only the period of limitations applicable to the direct liability could be invoked. On the other hand, in the case of gift taxes, where the donee is made liable not only directly, but also is subjected to liability as a transferee, the extended period of limitations there provided has been held applicable. *Moore* v. *Commissioner of Internal Revenue*, 146 F. 2d 824 (C.A. 2).

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[1] It is not disputed that at the time of his death the petitioner's husband owed federal income taxes exceeding $51,000, plus interest, and that, under the provisions of his will, assets having a market value exceeding $71,000 were transferred to the petitioner, thereby rendering the estate insolvent. This is true even though the amount of his liability was not determined or assessed until after his death. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 36; *Price* v. *United States*, 269 U.S. 492. And see *Pierce* v. *United States*, 255 U.S. 398; *United States* v. *Fisher*, 57 F. Supp. 410, 414 (E.D. Mich).

CONCLUSION

There is no conflict of decisions. The decision below is correct and there is no warrant for further review by this Court.

Respectfully submitted.

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